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No.

IN THE

Supreme Court of the United States

CORNELIUS WAYNE HOEVENAAR,

Petitioner,

v.

ALAN LAZAROFF

Respondent.

On Petition For Writ of Certiorari
To the Sixth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress violated the Establishment Clause by enacting the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 through § 2000cc-5, which requires state officials to lift unnecessary governmental burdens imposed on the religious exercise of institutionalized persons under their control.

PARTIES TO THE PROCEEDINGS

Petitioner Cornelius Hoevenaar is a Native American of Cherokee ancestry, an American citizen, and is a medium-security inmate of the Ohio Department of Rehabilitation and Correction. Cornelius Hoevenaar brings this action in his individual capacity.

Respondent Alan Lazaroff is the Warden at Madison Correctional Institution, located in London, Ohio. Respondent is an employee of the State of Ohio and is being sued both individually and in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner inmate, a Native American who brought suit against officials of the Ohio Department of Rehabilitation and Correction ("ODRC") alleging that ODRC's enforcement of its short-hair rule substantially burdens a fundamental tenet of his religion in violation of the Religious Land Use and Institutionalized Persons Act, ("RLUIPA"), 42 U.S.C. 2000cc-1, respectfully requests that this Court grant his Petition for Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals holding that RLUIPA violates the Establishment Clause of the First Amendment.

The Court has just granted a writ of certiorari on this precise question in *Cutter v. Wilkinson*, No. 03-9877, 2004 U.S. LEXIS 6695 *1 (October 12, 2004), and the interests of justice would be served by the consolidation of this case with *Cutter*.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Hoevenaar v. Lazaroff*, No. 03-4119, 2004 U.S. App. LEXIS 15652, *1 (July 23, 2004, 6th Cir.). It is reproduced in the Appendix at App. A. The opinion of the District Court, reported at 276 F.Supp. 2d 811 (S.D. Ohio, 2003), is reproduced in the Appendix at App. B.

JURISDICTION

On August 7, 2003, based on RLUIPA, the District Court granted Petitioner's Motion for a Preliminary Injunction enjoining Respondent from preventing Petitioner from growing a kouplock, (a two-inch square of hair at the base of the skull), in conformity with Petitioner's Cherokee religious beliefs. Respondent filed a motion for summary reversal of the District Court's decision based on the Sixth

Circuit's subsequent decision in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rehearing denied*, 2004 U.S. App. LEXIS 4294 (6th Cir. Mar. 3, 2004), which held that RLUIPA violates the Establishment Clause. On July 23, 2004, the Court of Appeals granted Respondent's motion for summary reversal based solely on its prior decision in *Cutter*. *Hoevenaar*, 2004 U.S. App. LEXIS 15652 at *9-*10. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE IN THIS CASE

1. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ."

2. The provisions of the RLUIPA that are relevant to this petition are in 42 U.S.C. § 2000cc-1:

> (a) General Rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution as defined in section 2 of the Civil Rights of Institutionalized Persons Act, even if the burden results from the rule of general applicability, unless the government demonstrates that imposition of the burden on that person--
>
> (1) is in the furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling government interest.
>
> (b) Scope of application. This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian Tribes.

STATEMENT OF THE CASE

The issue in this case--whether RLUIPA violates the Establishment Clause-- is already before the Court in *Cutter v. Wilkinson*, for which the Court granted certiorari on October 12, 2004. Petitioner similarly seeks review of the Sixth Circuit Court of Appeals' decision invalidating as unconstitutional provisions of the RLUIPA, 42 U.S.C. § 2000cc-1. Petitioner, a Native American prisoner who sought to grow long hair for religious reasons, filed suit in District Court to obtain an injunction preventing prison officials from cutting his hair. Respondent did not dispute the sincerity of Petitioner's religious belief that long hair was essential to the practice of his religion but instead contended that allowing Petitioner to grow long hair would compromise security. Based on RLUIPA, the District Court enjoined Respondent from cutting Petitioner's kouplock, a two-inch swath of hair that grows from the base of the skull.

In *Cutter*, the Sixth Circuit held that RLUIPA violates the Establishment Clause because it impermissibly advances religion and is therefore unconstitutional. 349 F.3d 257, 268-69. In light of *Cutter*, a panel of the Sixth Circuit summarily reversed the District Court's decision below. *See Hoevenaar*, 2004 U.S. App. LEXIS 15652 at *9-*10. Because the Sixth Circuit has declined to rehear *Cutter, en banc*, 2004 U.S. App. LEXIS 4294 (6th Cir. Mar. 3, 2004), Petitioner seeks review from this Court.

Petitioner contends that certiorari should be granted because the Sixth Circuit's rulings in *Cutter* and *Hoevenaar* conflict with the rulings of three other circuits which hold that RLUIPA does not violate the Establishment Clause: *Madison v. Riter,* 355 F.3d 310 (4th Cir. 2003) cert. petition pending *sub nom. Bass v. Madison*, No. 03-1404 (filed April 6, 2004), *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), and *Mayweathers v. Newland,* 314 F.3d 1062 (9th Cir. 2002), *cert. denied* 124 S. Ct. 66 (2003).

Review of the Sixth Circuit's ruling is also warranted because the Sixth Circuit's decision in *Cutter* conflicts with this Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 334 (1987).

Finally, Petitioner contends that the Court should grant certiorari and consolidate this case with *Cutter*, which presents the identical constitutional question.

REASONS FOR GRANTING OF THE PETITION

A. The Sixth Circuit's Holding Creates a Circuit Split.

The Sixth Circuit's holding in *Cutter*, as noted by the appellate panel assigned to Petitioner's case, goes against the great weight of circuit authority. 2004 U.S. App. LEXIS 15652 at * 8. Indeed, the district court cases upon which the Sixth Circuit relied were reversed on appeal. *Madison v. Riter,* 240 F.Supp.2d 566 (W.D. Va. 2003) rev'd by *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003)(cert pending, No. 1404); *Kilaab Al Ghashiyah (Khan) v. Dept. of Corrections*, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), overruled by *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003). The Fourth and Seventh Circuits concluded, as has the Ninth Circuit in *Mayweathers v. Newland*, 314 F.3d 601 (9th Cir. 2002), that RLUIPA is constitutional in accord with this Court's decision in *Amos*.

Moreover, the Sixth Circuit acknowledged in *Cutter* that "five circuits, including the Seventh and Ninth, have concluded that the identical language in RFRA [the Religious Freedom Restoration Act of 1993] does not violate the Establishment Clause." 349 F.3d 261-62.

The Sixth Circuit's holding that RLUIPA violates the Establishment Clause in is direct conflict with the decisions of every other Circuit to consider the question. The resulting split in authority therefore calls for this Court's review.

B. The Sixth Circuit's Ruling Conflicts With This Court's Jurisprudence.

The Sixth Circuit held in *Cutter* that an accommodation of religious practice under RLUIPA would favor religion over nonreligion and therefore violate the Establishment Clause. 349 F.3d at 264. However, the precedent of this Court makes clear that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," there is no concurrent requirement that the exemption come "packaged with benefits" to the similarly situated nonreligious. *Amos*, 483 U.S. at 338. Taking the Sixth Circuit's reasoning to its logical conclusion would mean that any accommodation of religious practice would require an equivalent secular accommodation or risk an impermissible endorsement of religion. This is a wrong conclusion. RLUIPA does not endorse religion, but rather frees inmates to practice religion, whatever that religion may be, in the absence of any compelling government interest to the contrary. A law is not unconstitutional simply because it allows the advancement of religion. *See Amos,* 483 U.S. 327, 337.

For a law to have forbidden effects under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the government itself must have advanced religion through its own activities and influence. *Id.* "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a

religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id. quoting Walz v. Tax Comm'r*, 397 U.S. 664 at 668 (1970). RLUIPA in no way sponsors or endorses any particular belief system but merely carves out reasonable accommodation where the state has no compelling interest to the contrary.

The Sixth Circuit's conclusion that RLUIPA is unconstitutional conflicts with this Court's decisions in *Amos* and *Walz*, thus justifying the grant of certiorari to Petitioner.

C. The Court Has Already Granted Certiorari on This Issue in Cutter and Should Therefore Consolidate the Two Cases.

The Court has already granted certiorari on the precise issue presented here: whether RLUIPA violates the Establishment clause. As a matter of justice and judicial economy, the Court should grant certiorari to this matter, because it has already granted certiorari in *Cutter*. This case involves essentially the same state prison system. In similar situations the Court has consolidated cases for review. *E.g. National Railroad Passenger Corp. et al. v. Boston & Maine Corp, Inc.; ICC v. Boston & Maine Corp.*, 502 U.S. 807 (1991), *Midlantic National Bank v. New Jersey Dept of Environmental Protection; O'Neil v. City of New York; O'Neil v. New Jersey Dept. of Environmental Protection*, 469 U.S. 1207 (1985).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted. In the alternative, Petitioner requests that the Court STAY this matter pending the outcome of the *Cutter* decision.

Respectfully Submitted,

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October 21, 2004

Appendix A

*2004 U.S. App. LEXIS 15652, **

CORNELIUS HOEVENAAR, Plaintiff-Appellee, v. ALAN LAZAROFF, Warden, Defendant-Appellant.

No. 03-4119

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2004 U.S. App. LEXIS 15652

July 23, 2004, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. 03-00190. Marbley. 08-07-03. Hoevenaar v. Lazaroff, 276 F. Supp. 2d 811, 2003 U.S. Dist. LEXIS 13948 (S.D. Ohio, 2003)

DISPOSITION: Reversed and remanded.

COUNSEL: For CORNELIUS WAYNE HOEVENAAR, Plaintiff - Appellee: David A. Singleton, Cincinnati, OH.

For ALAN LAZAROFF, Defendant - Appellant: Todd R. Marti, Asst. Atty. General, Office of the Attorney General, Columbus, OH.

JUDGES: Before: SILER and GIBBONS, Circuit Judges; REEVES, District Judge. *

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINIONBY: Danny C. Reeves

OPINION: DANNY C. REEVES, District Judge.
Plaintiff Cornelius Hoevenaar (Hoevenaar) is a native American of Cherokee ancestry currently **[*2]** serving a life sentence in the Ohio prison system. While incarcerated, Hoevenaar began to practice a native religion which contains as one of its tenets a requirement that he not cut his hair. As a result, Hoevenaar claims that prison rules regulating hair length violate his right to practice his religious beliefs and are in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.* (2000).

Following a hearing on the Plaintiff's request for a temporary injunction, the district court granted limited relief under RLUIPA, allowing Hoevenaar to maintain a "kouplock" (a two inch by two inch square section at the base of the skull that is grown longer than the person's remaining hair). However, because this court has recently held RLUIPA to be unconstitutional, we

REVERSE the decision of the district court granting injunctive relief to Hoevenaar.

BACKGROUND

At times relevant to this proceeding, Hoevenaar was incarcerated at the Madison Correctional Institution serving a life sentence. Beginning around 1998, Hoevenaar began following the practices of his Native American religion, which [*3] include growing his hair long. He claims that a fundamental tenet of this religion prohibits the cutting of his hair. This practice, however, is not permitted by an Ohio prison regulation that provides:

> Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. Hair and hairstyle shall not protude more than three inches from the scalp. Braids and plaits may be worn subject to the limitations of this rule. The following hairstyles or facial hair are not permitted: Initials, symbols, dyes, multiple parts, hair disproportionately longer in one area than another (excluding natural baldness), weaves, wigs, dreadlocks and shaved heads. Other hairstyles not specifically listed herein may be prohibited if they are determined to be either a threat to security or contrary to other legitimate penological concerns.

Ohio Admin. Code § 5120-9-25(D).

As a result of the conflict presented, Hoevenaar commenced an administrative proceeding challenging the relevant portion of the regulation. On February 19, 2003, he was notified by the office of Chief Inspector that his grievance had been denied and **[*4]** that the decision of the Inspector was affirmed. The Chief Inspector further instructed that "unless you have a Court ordered exemption, you are obligated to adhere to the inmate grooming code as stated in administrative rule 5120-9-25."

Hoevenaar filed suit challenging the Ohio regulation under the RLUIPA after his administrative grievance was denied. Following a hearing on the Plaintiff's request for a temporary injunction, the district court granted limited relief allowing Hoevenaar to maintain a kouplock. In addressing Hoevenaar's likelihood of success, the court analyzed his claims under RLUIPA as well as his First Amendment claim. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 The district court's conclusions regarding the First Amendment issue have not been challenged in this appeal.

- - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - -

As the district court noted, RLUIPA is similar to the Religious Freedom Restoration Act of 1993 (RFRA) in that the court must determine whether the plaintiff is likely to succeed in demonstrating that the regulation in issue imposes a substantial burden on his

religious [*5] exercise. *Hoevenaar v. Lazaroff*, 276 F. Supp. 2d 811, 818 (S.D. Ohio 2003). Assuming the plaintiff makes this initial showing, the court next considers whether the defendant is able to demonstrate that the substantial burden furthers a compelling state interest and is the "least restrictive means available for furthering that interest." *Id.* at 818 (quoting 42 U.S.C. § 2000cc-2(b) (2000)). Again, this test is the same as that previously imposed under RFRA.

In the present case, the district court found that Warden Lazaroff was "significantly likely" to satisfy his burden of demonstrating that the grooming regulation furthers a compelling state interest in identifying prison inmates and suppressing contraband in prisons. *Id.* at 819. Notwithstanding this finding, it concluded that the warden was unlikely to succeed in demonstrating that blanket application of the regulation, without individual exceptions, would be "the least restrictive means of furthering the government's interest in the efficient identification of escaped inmates." *Id.* at 824. According to the district court, "an exception to the grooming regulation ... that would [*6] allow for the growing of a 'kouplock' based on sincerely held religious beliefs, and would be granted to inmates who are determined not to pose a significant security risk, is a less restrictive means of furthering the compelling interest in identifying inmates." *Id.*

In addition to requiring prison officials to consider the particular hair style in issue, the district court indicated that the officials should consider the inmate's particular security classification and any specific medical condition that would bear on his security risk. According to the district court,

> just as the Defendant takes into consideration the fact that female inmates, as a whole, pose less of a security risk than male inmates as a justification for allowing female inmates to grow their hair long, so should the Defendant take into account the different security risks of various male inmates in making the decision of whether to allow them to grow a kouplock. In particular, here, the Plaintiff will likely succeed in demonstrating that, as a medium security prisoner who is losing feeling in his feet [due to neuropathy resulting from diabetes], he is unlikely to pose a security threat by being permitted [*7] to grow a kouplock.

Id.

Based on these findings, the district court concluded that limited injunctive relief should be granted, allowing Hoevenaar to maintain a kouplock.

STANDARD OF REVIEW

This court reviews a district court's decision to grant a preliminary injunction for abuse of discretion. *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995). A court abuses its discretion when it relies on clearly erroneous findings of fact, applies an inappropriate legal standard, or improperly applies the law, with such legal questions receiving *de novo* review in the Court of Appeals. *Id.*

at 1030. Therefore, a "legal or factual error may be sufficient to determine that the district court abused its discretion. However, absent such an error, the district court's weighing and balancing of the equities is overruled 'only in the rarest of cases.'" *Id.* at 1030 (*quoting American Imaging Svcs. v. Eagle-Picher Indus.*, 963 F.2d 855, 858 (6th Cir. 1992)). Under this standard, the district court's analysis and application of RLUIPA will be subject to *de novo* review.

ANALYSIS

In *Cutter v. Wilkinson*, 349 F.3d 257(6th Cir. 2003), **[*8]** *rehearing denied*, 2004 U.S. App. LEXIS 4294 (6th Cir. Mar. 3, 2004), this court squarely addressed the constitutionality of RLUIPA. Against the great weight of circuit authority, this court held that the statute violates the Establishment Clause because it favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation. *Id.* at 262.

Following briefing in this case, this court's decision in *Cutter v. Wilkinson* became final. As a result. Warden Lazaroff moved the court for summary reversal of the district court's decision. In opposing the Appellant's motion for summary reversal, Hoevenaar adopts the arguments contained in his previously-rejected motion to hold this appeal in abeyance and asserts that such relief is not appropriate in view of the pending petition for a writ of certiorari to the United States Supreme Court in the case of *Cutter v. Wilkinson.* He argues that, in light of the fact that this court's decision *Cutter* is directly contrary to all other circuits that have addressed the constitutionality of RLUIPA, this panel cannot conclude that he has no likelihood **[*9]** of success on the merits. Therefore, he contends that the

injunction issued by the district court should not be set aside.

With respect to Hoevenaar's argument, it should be noted that "[A] panel of this court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this court sitting *en banc* overrules the prior decision." *Gaddis v. Redford Township*, 364 F.3d 763, 770(6th Cir. 2004) (*quoting Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001)); *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). Based on the foregoing analysis, it is clear that *Cutter* compels reversal of the district court's decision. In short, the holding of Cutter dictates that Hoevenaar cannot prevail on the merits of his claim under RLUIPA and is not entitled to injunctive relief under the standard set out above. *Sandison*, 64 F.3d at 1030.

Because this panel finds the holding in *Cutter v. Wilkinson* to be dispositive, it is not necessary to address the remaining **[*10]** issues raised by Warden Lazaroff. Accordingly, we **GRANT** Warden Lazaroff's motion for summary reversal, **REVERSE** the decision of the district court and **REMAND** with instructions that the injunction be vacated.

Appendix B

*276 F. Supp. 2d 811, *; 2003 U.S. Dist. LEXIS 13948, **

CORNELIUS WAYNE HOEVENAAR, Plaintiff, v. ALAN LAZAROFF, Defendant.

Case No. 03-CV- 190

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

276 F. Supp. 2d 811; 2003 U.S. Dist. LEXIS 13948

August 7, 2003, Decided

SUBSEQUENT HISTORY: Reversed by, Remanded by **Hoevenaar v. Lazaroff, 2004 U.S. App. LEXIS 15652 (6th Cir. Ohio, July 23, 2004)**

DISPOSITION: [**1] Plaintiff's Motion for Preliminary Injunction granted to the extent that the Defendant enjoined from preventing the Plaintiff from growing a kouplock in accordance with his religious beliefs, pending the outcome of the final litigation of this matter.

COUNSEL: For CORNELIUS WAYNE HOENEVAAR, plaintiff: David A Singleton, Prison Reform Advocacy Center, Cincinnati, OH.

For ALAN LAZAROFF, defendant: Todd Robert Marti, Ohio Attorney General, Columbus, OH.

JUDGES: ALGENON L. MARBLEY, UNITED STATES DISTRICT COURT. Magistrate Judge Kemp.

OPINIONBY: ALGENON L. MARBLEY

OPINION: [*814] OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on the Plaintiff's Motion for a Preliminary Injunction. On June 9 and 10, 2003, this Court held a hearing on the Plaintiff's Motion. Through his Motion, the Plaintiff, a prisoner at the Madison Correctional Institute ("Madison"), seeks to prevent the Defendant, Alan Lazaroff, the Warden at Madison, and his agents, from cutting his hair in violation of his religious beliefs.

For the following reasons, the Plaintiff's Motion for a Preliminary Injunction is hereby **GRANTED** to the extent that the Defendant is **ENJOINED** from preventing the Plaintiff **[**2]** from growing a kouplock in accordance with his religious beliefs, pending the outcome of the final litigation of this matter.

II. BACKGROUND

The Plaintiff, Cornelius Wayne Hoevenaar, is a Native American of Cherokee ancestry. Hoevenaar is sixty-five years old, and is currently serving a life sentence at Madison. He suffers from a heart condition, diabetes, and neuropathy, a diabetic condition that he describes as causing the nerves in his feet to die, making him feel like he is "walking on stumps."

Hoevenaar is classified as a medium security inmate at Madison.

Hoevenaar embraced his Native American heritage in 1998, and now practices Native American religion. As he explained in detail at the hearing on this matter, growing his hair long is an essential part of his Native American religious beliefs and practices. According to his religious beliefs, his ancestors guide him in life as well as in his religious practice. As such, connecting to his ancestors is a key aspect of his religion. Another key aspect of his religion involves the ceremonies that he regularly performs to help him connect to his ancestors. Hoevenaar testified that having long hair is essential to his religious **[**3]** practices because, according to his beliefs, hair is the key to receiving positive energies **[*815]** and to connecting to his ancestors through the ceremonies he performs. He believes that his hair is also what connects him to the "Red Road of Life," or the path to spirituality. The Defendant, Alan Lazaroff, does not doubt the sincerity of Hoevenaar's religious beliefs.

Hoevenaar began growing his hair long for religious reasons in 2000. At that time, he was incarcerated at the Lebanon Correctional Institution ("Lebanon"). While at Lebanon, he was permitted to grow his hair long without incident. Then, in September 2001, Hoevenaar was transferred to Madison.

Madison's grooming regulation, as it relates to hair, provides: "Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. Hair and hairstyle shall not protrude more than three inches from the scalp. **Braids and plaits may be worn subject to the limitations of this rule.** ..." Ohio

Admin. Code § 5120-9-25(D) (Anderson 1998). n1 Upon his arrival at Madison, staff at that prison told Hoevenaar he would have to cut his hair to comply with this regulation. **[**4]** Hoevenaar testified that he complied because he "did not want to create waves."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 A prior version of this same regulation explicitly granted the prison warden the authority to make an exception to this rule based on a prisoner's religious beliefs. Specifically, that provision stated: "These limitations may be modified by the managing officer upon a showing by the inmate that a sincerely held belief of such inmate, deeply rooted in religion, conflicts with these limits." Ohio Admin. Code § 5120-9-25 (Anderson 1983). This provision was revised into its current form on August 26, 1991.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In July 2002, after his hair had grown back, Madison staff again directed Hoevenaar to cut his hair. Initially, he refused, based on the importance of his hair to his religious beliefs and practices. As a punishment for this refusal, Hoevenaar was placed in segregated confinement. After one week, Hoevenaar agreed to have his hair cut so that he could be released from confinement. During the week in which he was confined, Hoevenaar **[**5]** had been unable to practice his religion.

Hoevenaar filed a Complaint with this Court on March 3, 2003. Plaintiff avers the following claims: (1) violation of 42 U.S.C. § 1983 by virtue of the

Defendant's infringement of the Plaintiff's rights under the First Amendment to the United States Constitution; and (2) violation of 42 U.S.C. § 2000cc-1, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). This matter is now before the Court on the Plaintiff's Motion for a Preliminary Injunction. The Plaintiff seeks to enjoin the Defendant, Alan Lazaroff, the Warden at Madison, from forcing him to cut his hair again in violation of his religious beliefs. Although he seeks to enjoin Lazaroff from cutting his hair at all, Hoevenaar has said that he is willing to grow a "kouplock," which he described as a two-inch square of hair at the base of the skull, and have the rest of his hair cut.

III. DISCUSSION

In determining whether to issue a preliminary injunction, the Court is to examine: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether irreparable harm could result to the movant **[**6]** if the injunction is not issued; (3) whether substantial harm could result to others if the injunction is issued; and (4) whether the public interest would be served by issuing the injunction. *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230 (6th Cir. 2003) (citation omitted). The elements are factors to be balanced against each other, but each element need not be satisfied to issue a preliminary **[*816]** injunction. *Id.* (citing *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001)).

A. Likelihood of Success on the Merits

1. Likelihood of Success Under RLIUPA

a. Applicability of RLIUPA

The Plaintiff brings his claim 42 U.S.C. § 2000cc-1, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). That statute states, in pertinent part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person --
>
> (1) is in furtherance of a compelling governmental interest; [**7] and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application This section applies in any case in which --
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1 (West Supp. 2003).

In his Post-Trial Memorandum in Opposition to Injunctive Relief, the Defendant argues that the Plaintiff cannot succeed on his RLIUPA claim because he has failed to demonstrate either that the grooming regulation is imposed in a program or activity that receives Federal financial assistance, or that the grooming regulation affects, or that the removal thereof would affect, interstate commerce. *See* *Johnson v. Martin*, 223 F. Supp. 2d 820, 829-30 (W.D. Mich. 2002) (discussing the statutory requirement that the party invoking RLIUPA prove that one of the threshold conditions is present).

In response to that argument, the Plaintiff has filed, as an exhibit **[**8]** attached to his Post-Trial Reply Brief, joint stipulations of fact from an unrelated case involving the Defendant and another party. In those stipulations, the Defendant admits that the Ohio Department of Rehabilitation and Correction ("ODRC"), Lazaroff's employer, regularly receives federal funding through grants for which it applies. In response to that Post-Trial Reply Brief, the Defendant has filed a Motion to Strike, in which he seeks to strike the stipulations attached as an exhibit to Plaintiff's Post-Trial Reply Brief because the Plaintiff failed to introduce that exhibit prior to or during the preliminary injunction hearing. In response to the Motion to Strike, the Plaintiff has not only argued that the exhibit containing the stipulations should not be stricken from the record, but has also filed a Motion to Amend his Complaint to state the following:

Plaintiff is confined in an institution as defined by the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997).

The Ohio Department of Rehabilitation and Correction ("ODRC"), Defendant Lazaroff's employer, regularly applies for and receives federal funding.

RLUIPA applies in this case **[**9]** because the burden on religion is imposed in a program that receives federal funding.

ODRC also has established business agreements and regularly conducts transactions in interstate commerce.

[*817] Plaintiff orders books and other items relating to the practice of his religion from businesses located outside the state of Ohio.

RLUIPA applies in this case because the burden on religion (or the burden's removal) affects interstate commerce.

HN3 Federal Rule of Civil Procedure 12(f) governs Motions to Strike, and provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The Court finds that the material

contained in the exhibit sought to be stricken is neither redundant, nor immaterial, nor impertinent, nor scandalous. Furthermore, although the Defendant argues that the Plaintiff should not be permitted to introduce evidence necessary to prove an element of his case after the record has been closed, it is not unusual for a preliminary injunction hearing to be held without introducing all evidence that is necessary to a particular party's case. Indeed, "a preliminary injunction is customarily **[**10]** granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981)). Therefore, the Court **DENIES** the Defendant's Motion to Strike.

Leave to amend a complaint should be freely granted when justice so requires. FED. R. CIV. P. 15(a). Here, it appears that justice requires granting the Plaintiff's Motion to Amend his Complaint so that the Plaintiff may set forth in his Complaint the facts that provide the basis for his RLUIPA claim. With respect to the Motion for a Preliminary injunction, the amendment of the Plaintiff's Complaint is necessary to aid the Court in its determination of whether the Plaintiff has demonstrated a strong likelihood of success on the merits of his case. Therefore, the Court GRANTS the Plaintiff's Motion to Amend his Complaint.

The language of RLUIPA indicating that the substantial burden **[**11]** must be imposed in a program or activity that receives federal financial assistance was intended to track the language of other

civil rights legislation that is promulgated pursuant to Congress's authority under the Spending Clause of the United States Constitution. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (extension of Remarks by Rep. Canady). Indeed, Senators Orrin Hatch and Ted Kennedy explicitly stated that the law's protections "are properly confined to each federally assisted 'program or activity,' which is defined by incorporating a subset of the definition of the same phrase in Title VI of the Civil Rights Act of 1964." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

☐Title VI of the Civil Rights Act of 1964 defines "program or activity" as "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government ... any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a (1994). In accordance with this language, Senators Hatch and Kennedy recognized that, "in most applications, ['program or activity'] **[**12]** means the department that administers the challenged land use regulation or the department that administers the institution in which the claimant is housed." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Based on the representations in the Plaintiff's Amended Complaint, as well as the representations made in the stipulations attached **[*818]** as an exhibit to the Plaintiff's Reply to the Defendant's Post-Trial Brief, the Court finds that it is likely that the Plaintiff will be able to demonstrate, in a trial on the merits, that the ODRC, as the state agency that employs Defendant Lazaroff and houses the Plaintiff, receives Federal financial assistance.

Therefore, the Court finds that it is likely that the

Plaintiff will succeed in demonstrating that the RLUIPA applies to the ODRC and, accordingly, to the particular issues in this matter.

b. Substantial Burden

Long hair is a fundamental aspect of Hoevenaar's sincerely held religious beliefs and practices. By requiring him to cut his hair periodically to prevent his hair from growing past his ears or his shirt collar, Madison's grooming regulations prevent Hoevenaar from engaging in [**13] this fundamental aspect of his religion. The Plaintiff is likely to succeed, therefore, in demonstrating that the grooming regulations impose a substantial burden on his religious exercise. *Winburn v. Bologna*, 979 F. Supp. 531, 535 (W.D. Mich. 1997) (holding that, to satisfy the substantial burden requirement of the Religious Freedom Restoration Act ("RFRA"), RLUIPA's predecessor, the plaintiff had to show that the government's action interfered with a tenet or belief that is central to the religious doctrine) (citing *Stefanow v. McFadden*, 103 F.3d 1466 (9th Cir.1996)). n2

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n2 The Defendant has not argued that the Plaintiff is unlikely to succeed on this aspect of his claim.

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c. Compelling State Interest

Under RLUIPA, once the plaintiff has demonstrated

that a substantial burden is imposed on his religious exercise in a program or activity that receives federal funding, the burden shifts to the defendant to demonstrate that the substantial burden furthers a compelling state **[**14]** interest, and is the least restrictive means available for furthering that interest. 42 U.S.C. § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."). In evaluating whether the Defendant has satisfied this burden, the Court is to accord great deference to the views of prison administrators and officials regarding these issues. This deference is mandated by the legislative history of RLUIPA, which indicates that its trainers adopted the legislative history of the Religious Freedom Restoration Act ("RFRA"), RLUIPA's predecessor. The particular aspect of the RFRA legislative history adopted by the RLUIPA framers indicated that Congress did not intend to limit the high degree of deference that had been given to prison officials' analyses **[**15]** of operational matters prior to RFRA's enactment. A Joint Statement by Senators Hatch and Kennedy regarding the adoption of the bill which was enacted as RLUIPA explained:

> The compelling interest test is a standard that responds to facts and context. What the Judiciary Committee said about that standard in its report on RFRA is equally applicable to This Act:

"The committee expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations **[*819]** and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

"At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."

146 CONG. REC. S7775 (daily ed. July 27, 2000) (citing Senate Report 103-111 at 10 (1993)).

In light of the deference to be accorded Defendant's Lazaroff's views based on his experience and expertise as a prison administrator, the Court finds that Lazaroff is significantly **[**16]** likely to satisfy his burden of demonstrating that the grooming regulation furthers a compelling state interest. In particular, he will likely be able to demonstrate that the grooming regulation furthers the government's interest in identifying prison inmates and suppressing contraband in prisons.

This Court and others have concluded that the state's interests in identifying inmates and in suppressing contraband in prisons are compelling government interests. *See* Diaz v. Collins, 114 F.3d 69, 73 (5th Cir.

1997); *Harris v. Chapman*, 97 F.3d 499, 503-04 (11th Cir. 1996); *Davie v. Wingard*, 958 F. Supp. 1244, 1249-50 (S.D. Ohio 1997). With respect to contraband, it is particularly important for prison officials to be able to suppress weapons, which may be used to harm either inmates or the prison staff, and drugs, which may alter an inmate's behavior, as well as his sense of reality, making him more difficult to control. The grooming regulation furthers the interest in suppressing these and other contraband items by decreasing the possibility that an inmate will be able to hide contraband items in his hair.

With respect to the interest **[**17]** in identifying inmates, it is significant to note that this interest is compelling not only while the inmate is in prison, but also in the event that the inmate escapes from prison. Within the prison system, it is important for prison staff to be able to identify inmates quickly so that they can assure that medicine and commissary goods are properly distributed, and so that they can verify that inmates appear at their assigned work and housing locations. The ability to identify inmates quickly within the prison also relates to the ability of prison staff members to account for all inmates within the prison, and to deal with prison misconduct. In the event that an inmate escapes from prison, both prison officials and members of the public must be able to identify an escaped inmate quickly and easily to facilitate his apprehension and return. The grooming regulation furthers this interest by decreasing the ways in which an inmate, either within prison or upon escape, can alter his appearance by cutting or changing his hair style. n3 The regulation also furthers this interest because, if an inmate has regulation-length hair, he is unable to use his hair to hide scars, blemishes, or other **[**18]** features by which he can

be identified.

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n3 During the preliminary injunction hearing, witnesses for both parties acknowledged that long hair impacts an individual's profile, such that cutting long hair can change others' perception of the profile. Witnesses also acknowledged that individuals with long hair have a greater number of ways of altering their appearance than individuals with short hair.

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The Plaintiff argues that the grooming regulation is not sufficiently connected to the compelling interests set forth by the Defendant to establish that either interest is actually furthered by the grooming regulation. With respect to the interest in **[*820]** suppressing contraband, the Plaintiff argues that the grooming regulation does not further that interest in light of the fact that it is unlikely that any prisoner would secrete contraband in his hair because, as one witness testified, there are so many other better places to hide contraband. n4 He also notes that the regulation does nothing to further the interest in suppressing **[**19]** contraband as a practical matter because contraband can be hidden even in regulation-length hair. With respect to the interest in identifying inmates, Hoevenaar contends that the grooming regulation does not further that interest in light of the numerous ways in which an inmate can alter his appearance, of which altering his long hair is merely one. n5 He points out that this is particularly true in light of the fact that the grooming regulation permits inmates to grow facial

hair and to braid or plait their regulation-length hair. He indicates that the ability shave or dye a beard, or to comb out a braid or plait into an afro-type hair style, gives inmates as many, if not more, ways of altering their appearance. He argues that, if these things are permitted, then the grooming regulation prohibiting long hair could not really be intended to further the interest in identifying inmates. Rather, he asserts that, for all of these reasons, both the interest in identifying inmates and the interest in suppressing contraband are simply impermissible post hoc rationalizations for the grooming regulation.

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n4 Indeed, the Plaintiff points out that one of the Defendant's witnesses testified that probably less than one percent of contraband is ever recovered from inmates' hair. **[**20]**

n5 For example, even an inmate with regulation-length hair has the ability to alter his appearance by shaving some or all of his hair, dyeing his hair, or purchasing a wig, glasses, or some other disguise.

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The Court rejects the Plaintiff's arguments that the grooming regulations are not sufficiently related to the government's compelling security interests for the Defendant to meet his burden of establishing that the regulation furthers those interests. Although the grooming regulations do not serve as an absolute

guarantee that an inmate will not be able to alter his appearance upon escape, or that he will not be able to secrete contraband in his hair, they reduce the likelihood of either of those security problems. While there may be numerous ways in which an inmate can alter his appearance, the grooming regulations, by eliminating one way in which an inmate can alter his appearance with little time or effort, at least decrease the likelihood that an inmate would alter his appearance. Similarly, while there may be many places for an inmate to hide contraband on his person, the grooming regulations **[**21]** eliminate one place for doing so, and thereby decrease the possibility that an inmate will, in fact, secrete contraband on his person. Thus, the Plaintiff has failed to demonstrate that the compelling justifications set forth by the Defendant constitute mere post hoc rationalizations for the grooming regulations.

Therefore, the Court concludes that the Defendant will likely succeed in demonstrating that the grooming regulations further compelling government interests.

d. Least Restrictive Means

The primary dispute in this matter is whether the grooming regulation is the least restrictive means of furthering the Defendant's interests in suppressing contraband and in identifying inmates.

The Plaintiff argues that the grooming regulation is not the least restrictive means of furthering these interests, and offers suggestions as to how the security interests might be furthered without infringing on the ability of inmates such as Hoevenaar to exercise their First Amendment **[*821]** rights by growing their hair long. First, he asserts that the Defendant can further the

compelling interest in suppressing contraband by allowing inmates to grow their hair long, but requiring inmates with long [**22] hair to be subjected to periodic hair searches, which could be conducted by the prisoners themselves under the careful watch of prison guards. *See* Flagner v. Wilkinson, 241 F.3d 475, 485 (6th Cir. 2001) (recognizing that no problems had resulted when an inmate had been permitted to search his own hair in view of prison staff, which only took a few seconds to accomplish). The Plaintiff explains that this would be conducted in a manner similar to the way in which strip searches are currently conducted, whereby the inmate is permitted to manipulate his body cavities as the prison staff observes.

Second, the Plaintiff states that the Defendant can further the compelling interest in identifying inmates by allowing inmates to grow their hair long, but rephotographing inmates with their long hair, and retaining photographs of the inmate with both long and short hair on file. *See* Estep v. Dent, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (granting preliminary injunction to Orthodox Jew who challenged the cutting of his sidelocks under RFRA based on the finding that shaving the sidelocks was not the least restrictive means of furthering the interest in identification [**23] because the inmate could be photographed with and without sidelocks). The Plaintiff points out that, were an inmate with long hair to escape from prison, the authorities could release pictures of the inmate with both long and short hair. *See* Flagner, 241 F.3d at 486 (concluding that releasing multiple images of a prisoner would help, rather than hinder, apprehension of an escapee by showing the range of his possible appearances). The Plaintiff notes that rephotographing a prisoner after his hair grows to a certain length would comport with the

prison's current practice, as required by the grooming regulation, of rephotographing an inmate whenever his appearance significantly changes in any manner Ohio Admin. Code § 5120-9-25(G) ("A new photo shall be taken whenever in the judgment of the managing officer or designee any significant change in physical appearance has taken place.").

Finally, the Plaintiff argues that the fact that the grooming regulation is not the least restrictive means of furthering the prison's security interests is demonstrated by the fact that the regulation, and the inability of the warden to grant an exemption, applies to all inmates equally, **[**24]** regardless of their security classification. The Plaintiff argues that, whether an exemption to the grooming regulation should be granted should be a fact-based determination, taking into account a particular inmate's security classification. In his case, he states that the fact that he is a medium security prisoner whose ability to use his feet is deteriorating due to his diabetes indicates that the granting of an exemption would be proper and, therefore, a blanket enforcement of the grooming regulation is not the least restrictive means of furthering the Defendant's security interests.

Based on the following problems that he alleges would arise from all of the alternatives posed by the Plaintiff, the Defendant asserts that the grooming regulation is the least restrictive means of furthering the compelling security interests relating to inmate identification and the suppression of contraband. *See* Phipps v. Parker, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (concluding that requiring inmates to keep their hair short is the only realistic method of achieving the goal of quick identification of inmates). First, regarding the suggestion that inmates with long hair be

permitted [**25] to conduct searches of their own hair, the Defendant states that this purported less [*822] restrictive means of furthering the interest in suppressing contraband is not feasible because the inmate would likely feign a search in such a way as to keep any contraband secreted. In addition, the Defendant argues that requiring any search of an inmate's hair, whether by the prison staff or by the inmate himself, is problematic because it increases the opportunities for confrontations between inmates and prison staff.

Second, with respect to the suggestion that the prison retain multiple photographs of the prisoner with both long and short hair for identification within the prison, the Defendant states that this, too, would be problematic because it would be difficult to fit more than one picture on inmate identification cards. Additionally, it would be difficult for prison staff members to review more than one picture on an identification card to assure that the inmate before them is the person on the identification card. The Defendant states that the time it would take staff members to review multiple pictures at the various places identification cards are examined would create "bottlenecks" [**26] at busy places within the prison.

Third, with respect to the suggestion that multiple photographs of the inmate be released in the event of an escape, the Defendant argues that this suggestion is not feasible for a couple of reasons. First, the release of multiple photographs would take time, which is problematic because, in the event of an escape, time is of the essence. n6 In addition, the Defendant contends that the release of multiple photographs would likely cause more confusion among recipients than help them in determining what the escapee may look like with

different hair cuts. As one witness testified, eyewitnesses usually respond better after seeing only one picture of a suspect than after seeing multiple pictures of the suspect. Furthermore, the release of multiple photographs could be confusing to the extent that people seeing multiple photographs may mistakenly only look for someone resembling one of those photographs when, in reality, it would be impossible to distribute photographs that could represent all of the ways in which an inmate with long hair might alter his appearance upon escape.

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n6 At the preliminary injunction hearing, a witness for the Defendant explained that the longer time goes on without catching the escaped inmate, the less likely it becomes that the inmate will be captured.

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[27]**

Finally, the Defendant contends that it would not be helpful to grant exemptions to the grooming regulation based on inmates' security classification. He notes that escape attempts and contraband problems arise even in minimum and medium security prisons. Thus, it would not be helpful to assume that minimum or medium security inmates would not pose the security risks attempted to be prevented by these regulations. Moreover, the Defendant maintains that individualized exemptions are problematic because they cause resentment among the other inmates, a copycat effect, and problems with enforcement of the regulations due to staff members' difficulties in determining who is

exempted and who is not.

Although the Court must accord due deference to the Defendant's opinion on whether the grooming regulation constitutes the least restrictive means of furthering the government's compelling interests, the Court need not accept at face value those opinions that are clearly illogical in light of the evidence before the Court. For example, although the Defendant argues that searches of inmates' hair performed by the inmates themselves under the careful watch of prison guards is not feasible, this **[**28]** ignores the fact that this is precisely how strip searches are currently **[*823]** conducted. In addition, as noted above, prior to 1991, the grooming regulation permitted the warden to make exceptions from the regulation for inmates based on their sincerely held religious beliefs. The Defendant has not presented any evidence indicating that, when that version of the regulation was in effect, the incidence of inmates hiding contraband in their hair increased greatly or that, since the new regulation went into effect, the incidence of inmates hiding contraband in their hair has decreased to a significant extent. This fact undermines the Defendant's assertion that the grooming regulation as written is the least restrictive means of furthering the security interest in suppressing contraband.

Second, although the Defendant states that taking multiple photographs of prisoners would cause significant problems with respect to the identification of inmates within the prison, this assertion is belied by the language of the current grooming regulation which, as indicated above, explicitly requires an additional photograph to be taken any time the inmate's appearance changes significantly. Furthermore, **[**29]** the grooming regulations for

female inmates permit them to grow their hair to the middle of their backs. Ohio Admin. Code § 5120-9-251. Although the Defendant argues that female inmates pose less of a security risk than male inmates in that they are less likely to possess contraband, they are substantially less likely to escape, and they are generally less violent than male inmates, staff members at the women's prisons no doubt have the same need that staff members at the men's prisons have to be able to identify prisoners quickly to prevent "bottlenecks" in lines while distributing medicine and commissary goods and while verifying that the inmates show up at the proper work and housing locations. Yet, allowing the female inmates to grow their hair down to the middle of their backs does not seem to pose a problem in this regard. This undermines the Defendant's argument that allowing the male inmates to grow their hair long for religious reasons would interfere with the efficient identification of inmates within the prison. n7

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n7 The Defendant cites a number of cases in support of his position that courts have unanimously rejected the argument that the fact that female inmates are permitted to grow their hair long means that male inmates should be permitted to grow their hair long. *See, e.g., Lentz v. Wilkerson,* No. 94-4314 (6th Cir. Mar. 31, 1995); Davie v. Wingard, 958 F. Supp. 1244, 1252-53 (S.D. Ohio 1997); *Pariseau v. Wilkinson,* No. C2-92-1010 (S.D. Ohio Aug. 23, 1995). Those cases discuss the same arguments that the Defendant sets forth here as to why the difference between the male and female grooming regulations should not be considered by this Court. The cases that considered

these arguments, however, are distinguishable because they addressed either Equal Protection claims brought by male prisoners or First Amendment claims brought prior to the promulgation of RLUIPA. Unlike RLUIPA claims, which require a finding that the regulation serves a compelling state interest and is the least restrictive means available for serving that interest, the claims examined by these courts were subject to only intermediate or rational basis scrutiny. Moreover, those cases did not examine the differences between the male and female grooming regulations with respect to the argument that the male grooming regulation is necessary for easy identification of inmates within the prison, as the Court does here.

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Despite these problems with some of the rationales set forth by the Defendant in support of his position that the grooming regulation is the least restrictive means of furthering the compelling government interests, the Court finds that the Defendant is likely to succeed in demonstrating that the grooming regulation is necessary to facilitate the return of an escaped inmate, and that the release of multiple pictures of an inmate with varying lengths of hair would not be a less restrictive **[*824]** alternative for furthering this governmental interest. Nonetheless, the Court also finds that the Defendant is unlikely to succeed in demonstrating that a blanket application of the grooming regulation, without any sort of exception, is the least restrictive means of furthering the government's interest in the efficient identification of escaped inmates. The Court accepts the position that a blanket restriction on growing a full head of long hair

is necessary to further this interest because of the ways in which a full head of long hair can be modified to alter an inmate's appearance, making him more difficult to locate quickly upon an escape. An exception to the grooming regulation, however, that [**31] would allow for the growing of a "kouplock" based on sincerely held religious beliefs, and would be granted to inmates who are determined not to pose a significant security risk, is a less restrictive means of furthering the compelling interest in identifying inmates.

The Plaintiff testified that a kouplock is a two-inch square of hair that would grow starting at the base of the skull. Unlike a full head of long hair, a kouplock does not provide an inmate with a full range of options for changing his appearance upon escape. In addition, a kouplock cannot be maneuvered to cover identifiable marks on an inmate's face. Moreover, multiple pictures of an inmate with a kouplock are not necessary as a kouplock cannot be modified or rearranged to alter the appearance of either the inmate's face or his profile. Therefore, the Defendant is unlikely to succeed in demonstrating that an exception to the grooming regulation that would allow inmates who are determined not to pose a significant security risk to grow a kouplock based on sincerely held religious beliefs is not a feasible less restrictive means of furthering the government's interest in identifying inmates.

The Court notes that the [**32] Plaintiff is likely to succeed in demonstrating that the decision of whether to allow an inmate to grow a kouplock based on sincerely held religious beliefs should be based on an analysis of whether the particular inmate seeking the exemption from the grooming regulation poses a

significant security risk, taking into account the inmate's security classification. Just as the Defendant takes into consideration the fact that female inmates, as a whole, pose less of a security risk than male inmates as a justification for allowing female inmates to grow their hair long, so should the Defendant take into account the different security risks of various male inmates in making the decision of whether to allow them to grow a kouplock. In particular, here, the Plaintiff will likely succeed in demonstrating that, as a medium security prisoner who is losing feeling in his feet, he is unlikely to pose a security threat by being permitted to grow a kouplock.

Therefore, the Court finds that the Plaintiff has shown a strong likelihood of success on the merits of his RLUIPA claim to the extent that prohibiting the warden to grant any religious-based exemption to the grooming regulation, including [**33] the growing of a kouplock, is not the least restrictive means of furthering the compelling government interests. n8

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n8 The Court recognizes that the Defendant asserts that a number of courts have rejected claims that are substantially similar to the claim now brought by the Plaintiff. The only Sixth Circuit case cited by the Defendant in this regard, however, *Pollock v. Marshall*, 845 F.2d 656 (6th Cir. 1988), rejected a similar claim under the lower standard of review required by First Amendment claims, not under the strict scrutiny required by RLUIPA. Indeed, *Flagner*, a 2001 case out of the Sixth Circuit, concluded that a plaintiff who, like Hoevenaar, objected to the grooming regulation based on his sincerely held

religious beliefs, could pursue injunctive and declaratory relief, even under the lower First Amendment rational basis standard of review. Moreover, none of the cases cited by the Defendant as having rejected similar claims under the RFRA or RLUIPA strict scrutiny standard discussed the less restrictive option of allowing a Native American who does not pose a significant security risk to grow a kouplock.

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[34]**

[*825] 2. Likelihood of Success Under the First Amendment

Hoevenaar also seeks to enjoin the Defendant's enforcement of the grooming regulation as a violation of his First Amendment rights. To state a claim for violation of his First Amendment rights, a prisoner must demonstrate that the allegedly infringing regulation is not reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). In determining whether the Plaintiff has made this showing, four factors guide the Court's analysis: (1) whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether alternative means of exercising the constitutional right remain open to the inmate; (3) the impact accommodation of the constitutional right will have on guards and other inmates, as well as on prison resources generally; and (4) whether an alternative exists that "fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at

88-91. The four factors need not be weighed evenly, but serve simply [**35] as guidelines to evaluate whether the regulation is reasonably related to a valid penological interest. *Flagner v. Wilkinson*, 241 F.3d 475, 484 (6th Cir. 2001).

a. Valid, Rational Connection

The Defendant argues that there is a valid, rational connection between the grooming regulation and the legitimate interests in maintaining the ability to identify inmates quickly, both within the prison and in the event of an escape, and in suppressing contraband within the prison. The Court agrees. As discussed above with respect to the Plaintiff's RLUIPA claim, both of these legitimate security interests are furthered by the grooming regulation by reducing the ways in which an inmate can alter his appearance, and by reducing the places in which an inmate can conceal contraband on his person. *See Pollock v. Marshall*, 845 F.2d 656, 659 (6th Cir. 1988) (recognizing both the identification of inmates and the suppression of contraband as legitimate penological interests).

The Plaintiff relies on *Flagner* for his position that no valid, rational connection exists between the regulation and the Defendant's legitimate security interests. In *Flagner*, when [**36] an Orthodox Jewish prisoner sought an exemption to the prison grooming regulation to grow a full beard and sidelocks in accordance with his religious beliefs, the Sixth Circuit considered both of the foregoing rationales, which had been proffered by the defendants in that case as a basis for denying the exemption. The *Flagner* court rejected the defendants' argument that the grooming regulation bore a valid and rational connection to those legitimate interests because, there, the defendants had failed to

present any evidence that the inmate seeking the injunction was either an escape risk or that he had ever been caught with contraband during a search of his beard or sidelocks. *Flagner*, 241 F.3d at 485-86.

This case is distinguishable from *Flagner* with respect to these issues. Unlike the plaintiff in that case, Hoevenaar has a history that includes three escape attempts. n9 Two of these escape attempts **[*826]** took place within the last decade, including in the year 2000. Also unlike the plaintiff in *Flagner*, Hoevenaar also has a history of being involved with contraband. He has pled guilty to or has been found guilty of violating Ohio Admin. Code § 5120-9-06(8), **[**37]** which prohibits the possession of contraband, eight times while in custody in the Ohio prison system. Two of these contraband violations occurred during the last year. Thus, the grooming regulation is rationally related to the Defendant's legitimate security interests not only as a general matter, but also as specifically applied to the Plaintiff.

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n9 The Plaintiff argues that at least two of these incidents should not be classified as "escape attempts" because they did not involve actual, physical attempts by Hoevenaar to escape. The labeling of these two incidents as "escape attempts," however, is logical based on the contraband that Hoevenaar was found to possess at the time of those "attempts." For example, one of these incidents is classified as an "escape attempt" based on Hoevenaar's possession of local maps and a sharp can opener, which could have been used as a weapon. Similarly, another one of the "attempts" related to Hoevenaar's possession of

security phone numbers and an officer's uniform with his name on it.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[**38]

b. Alternative Means of Exercising Constitutional Right, Impact of Accommodation, Available Alternative for Accommodating Prisoner's Rights

HN18 The last three *Turner* factors are to be balanced and evaluated together. *Flagner*, 241 F.3d at 484. With respect to the question of whether alternative means of exercising his religion remain open to the Plaintiff, *Flagner* indicates that this factor weighs in favor of Hoevenaar. In *Flagner*, the Sixth Circuit determined that enforcement of the grooming regulation would leave the plaintiff with no viable alternative for exercising the particular tenet of his religion that required him to grow a beard and sidelocks. *Id.* at 486 (noting that the ability to exercise other aspects of his religion would not make up for violating this particular aspect of his religion). Similarly, here, the only alternative available to Hoevenaar for practicing this particular fundamental aspect of his religion is to grow a kouplock. Even this alternative, however, would require an accommodation with respect to the grooming requirements.

Similarly, *Flagner* also indicates that the third factor weighs in favor of the [**39] Plaintiff. The *Flagner* court found that the third factor weighed in favor of the plaintiff because no prison resources were ever diverted to accommodate the plaintiff's exemption from the grooming regulation, no extra guards were ever hired, nor were regular guards paid overtime, to

respond to the additional security risks allegedly created by the plaintiff's exemption to the grooming regulation, and no evidence indicated that other inmates resented the plaintiff because of his exemption. *Flagner,* 241 F.3d at 486. Likewise, here, although the Defendant surmises that exempting inmates from the grooming regulation could cause resentment among non-exempted inmates, he has offered no proof that inmates resented those who were granted religious exemptions under the prior version of the grooming regulation, which permitted the warden to grant exemptions based on religious beliefs. In addition, although the Defendant argues that an exemption would require prison staff to search manually through an exempted inmates' hair, thereby putting the prison staff at risk from the sharp objects that may be hidden in the hair, in fact, as was done in *Flagner,* the inmate might **[**40]** search his own hair under the watch of a prison guard. Indeed, during the preliminary injunction hearing, the Defendant testified that this is how hair searches were conducted under the prior version of the grooming regulation. Moreover, this self search can be done quickly and effectively. Finally, although the Defendant contends that exemptions from the grooming regulation could make it more difficult for prison staff to determine who is subject **[*827]** to the regulation, as the Plaintiff has pointed out, this problem is eliminated by the fact that any inmate with an exemption would carry a "blue card" with him at all times, as Hoevenaar does for his other religious accommodations. Staff members would easily be able to determine that any inmate without a blue card would be subject to the regulation.

The fourth *Turner* factor likewise weighs in favor of the Plaintiff in light of the fact that he can be accommodated by being permitted to grow a

kouplock, which would impose a *de minimis* burden on the prison, requiring only that Hoevenaar be permitted to conduct a periodic search of his own hair under the careful watch of prison guards. Most likely, as discussed above, a kouplock **[**41]** would not even require multiple photographs to be taken, as a kouplock is unlikely to significantly alter an inmate's appearance.

On balance, the second, third, and fourth factors of the *Turner* analysis weigh in favor of the Plaintiff. Hoevenaar's prior history of escape attempts and citations for possession of contraband, however, weigh heavily in favor of the Defendant. Indeed, in light of Hoevenaar's extensive history, and in light of the low level of scrutiny to be imposed in First Amendment claims such as this, the Court believes that the Defendant would likely be able to demonstrate that the first of the four *Turner* factors outweighs the considerations set forth in the remaining three factors.

Therefore, the Court finds that, although it is likely that the Plaintiff will succeed on his RLUIPA claim, the Plaintiff has not demonstrated a substantial likelihood of success on his First Amendment claim.

B. Irreparable Injury

The Court finds that the denial of an injunction under these circumstances would cause the Plaintiff to suffer irreparable harm. As Hoevenaar testified at the preliminary injunction hearing, and as discussed above, long hair is his "spiritual essence"; **[**42]** it allows him to absorb positive energy during religious ceremonies, it facilitates his connection to his ancestors, and it brings him closer to the "Red Road of Life," or the path to goodness and spirituality. It is

clear that long hair is essential to Hoevenaar's sincerely held religious beliefs and his exercise thereof. Accordingly, denial of the requested injunction, which would result in irreparable harm. *Goodman v. Money*, 180 F. Supp. 2d 946, 947 (N.D. Ohio 2001) (finding that the cutting of an inmate's hair in violation of his sincerely held religious beliefs constitutes irreparable harm); *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W.D. Ky. 1996) (stating that every time prison officials cut the plaintiff's earlocks, they were potentially violating his First Amendment rights, and thereby committing irreparable harm).

The fact that the Plaintiff may be able engage in other facets of his religious practice does not undercut the conclusion that the denial of the injunction would result in irreparable harm. This Court would not tell an Orthodox Jewish prisoner that he need not be permitted to grow sidelocks **[**43]** because he already receives dietary accommodations so that he may adhere to Judaism's dietary laws. Both practices are essential to his religious exercise, and the presence of one does not negate the necessity of the other. *See Flagner*, 241 F.3d at 486 ("None of the other aspects of [the plaintiff's] religion could ever compensate for the fact that an essential tenet of his religious beliefs prevents him from cutting his beard or sidelocks, and that enforcement of the grooming regulation would require the plaintiff to violate this very tenet."). So here, the fact that Hoevenaar may engage in smudging ceremonies and other religious practices **[*828]** does not negate the necessity of having long hair when he does so.

Therefore, the Court finds that the denial of the injunction would cause the Plaintiff irreparable harm.

C. Substantial Harm to Others

The Court does not believe that granting the injunction requested by the Plaintiff would result in substantial harm to others. The Defendant argues that granting the injunction would, in fact, cause harm in multiple ways. First, he contends that granting the injunction would cause other inmates without an exemption **[**44]** to be resentful of the Plaintiff. The Defendant has presented no evidence, however, that when inmates were granted religious exemptions under the prior grooming regulation, such resentment actually resulted among the inmates at Madison, nor has the Defendant demonstrated that resentment or tension among inmates decreased when the grooming regulation was altered so that exemptions could not be given to inmates on the basis of sincerely held religious beliefs.

Second, the Defendant states that the prison staff would be burdened by the granting of an injunction because they would be forced to search the Plaintiff's hair as it might grow in a kouplock. For the reasons discussed above, however, the Court finds that this issue does not impose a significant burden on prison staff.

D. Public Interest

The public interest is served when an individual is able to enjoy the rights that he is explicitly granted pursuant to federal law. Accordingly, granting the injunction sought by the Plaintiff here is in the public interest. The Defendant argues that it would be in the public interest to deny the injunction because, for the reasons discussed above, it might take longer to capture an escaped **[**45]** inmate who was allowed to grow his

hair long. The Court has determined, however, that the less restrictive means of furthering the government interest in identifying inmates is not to allow all inmates to grow their hair long, but to allow inmates who are determined not to pose significant security risks to grow kouplocks as required by their sincerely held religious beliefs. As discussed above, a kouplock cannot be manipulated to alter the appearance of an inmate's face or his profile. Therefore, the granting of the injunction is not likely to result in the delayed capture of an inmate in the event of an escape.

Therefore, the Court finds that it would be in the public interest to grant the Plaintiff's injunction.

IV. CONCLUSION

In light of the foregoing analysis, the Court finds that all four factors to be considered upon a motion for a preliminary injunction weigh in favor of the Plaintiff with respect to his RLUIPA claim. Therefore, the Court **GRANTS** the Plaintiff's Motion for a Preliminary Injunction. The Defendant is hereby **ENJOINED** from preventing the Plaintiff from growing a kouplock, as described by the Plaintiff during the hearing on this matter, pending **[**46]** the outcome of the final litigation of this matter.

IT IS SO ORDERED.

ALGENON L. MARBLEY

UNITED STATES DISTRICT COURT

Dated: August 7, 2003

SUPREME COURT, U.S.
FILED
NOV 2 2 2004
OFFICE OF THE CLERK

(a)

No. 04-534

In The Supreme Court Of The United States

CORNELIUS WAYNE HOEVENAAR,
Petitioner,

v.

ALAN LAZAROFF,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does application of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified in relevant part at 42 U.S.C. § 2000cc-1, to prisons violate the Establishment Clause or other constitutional limitations on Congress's powers?

Respondent submits that this case should be held, without further action, pending disposition of *Cutter v. Wilkinson*, case No. 03-9877. Respondent also submits that Petitioners' unexplained request for a stay should be denied.

STATEMENT OF THE CASE

Petitioner Hoevenaar is an Ohio prisoner serving a life sentence. Respondent Lazaroff, the warden of the prison where Hoevenaar is housed, required him to comply with an Ohio regulation requiring prisoners to keep their hair short.

Hoevenaar, who professes a Native American religion that requires its adherents to refrain from cutting their hair, sued, claiming that enforcement of the regulation violated his rights under RLUIPA and the Free Exercise Clause of the First Amendment. He also sought a preliminary injunction against enforcement of that regulation.

A hearing was held where the State showed the regulation has two primary purposes. One is to thwart escape attempts by limiting inmates' ability to elude recapture by cutting their otherwise long hair in order to change their appearance. The other is to suppress contraband by limiting inmates' ability to hide small items in their hair. Pet. at A21-A25

The evidence showed that Hoevenaar has an unusually extensive record of both behaviors. He has been involved in three escape attempts, the most recent being in 2002. It also showed that he has a long history of possessing contraband. *Id.* at A37.

The district court concluded that, given those facts, enforcement of the regulation was reasonable under the standard set in *Turner v. Safley*, 482 U.S. 78 (1987). It therefore held that Hoevenaar had no prospects for success

on his First Amendment claim and denied injunctive relief on that basis.

However, that court found that that Hoevenaar had a strong likelihood of success under RLUIPA because it felt that there were less restrictive ways to deal with the escape and contraband problems motivating the grooming regulation. More specifically, it found that those concerns could be adequately addressed by granting Hoevenaar an individualized exemption allowing him to wear some, but not all, of his hair long. It therefore entered an injunction requiring that he be permitted to wear a Kouplock, a two by two inch column of hair, beyond the length allowed by the grooming regulation.

Lazaroff took an interlocutory appeal under 28 U.S.C. § 1292, arguing, *inter alia*, that the district court misapplied RLUIPA's least restrictive means requirement. While that appeal was pending in the Sixth Circuit, that court held in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), that RLUIPA violates the Establishment Clause. The panel hearing Hoevenaar's case concluded that the injunction must be reversed because *Cutter* removed the sole basis for that relief. *Hoevenaar v. Lazaroff*, 108 Fed. Appx. 250 (6th Cir. 2004). That decision made no independent analysis of RLUIPA's constitutionality

This petition followed.

DISCUSSION

Respondent Lazaroff submits that this case should be held, without further action, pending the outcome of *Cutter*. Also, the Sixth Circuit's decision should not be stayed.

A. Review of the issue is warranted, but the Court is already reviewing this issue in *Cutter*.

Hoevenaar correctly states that the circuits are split on RLUIPA's constitutionality. That split concerns an important question of federal law because of RLUIPA's significant, and deleterious, effect on day-to-day prison operations across the country. The question presented is therefore worthy of review and will be resolved in *Cutter*.

B. Consolidation with *Cutter* would complicate that case with no offsetting benefit.

However, Hoevenaar's request to consolidate his case with *Cutter* should be denied for two reasons.

First, it would complicate the already complex proceedings in *Cutter*. That case involves three groups of prisoners pressing distinct types of claims and two sets of counsel defending RLUIPA's constitutionality. Briefing is already underway, and due to various extensions, *Cutter's* schedule has already been modified twice. Folding this case into those proceedings would inject new parties, new facts and another set of counsel, and likely require further modification of the *Cutter* case schedule. That would unduly disrupt *Cutter*.

Second, no offsetting benefit would result from consolidating this case with *Cutter*. The *Cutter* record is fully developed, both legally and factually, and this case provides nothing new.

In short, this case would add nothing but complexity and delay to *Cutter*. That counsels strongly against consolidation.

C. No stay is warranted.

Finally, Hoevenaar's request for a stay should be denied because he has not explained why one is needed. Rule 23.3 requires that he "set out with particularity" the grounds for that relief but he has made no argument, a particularized or otherwise, in support of a stay. That unexplained request for extraordinary relief should be denied.

CONCLUSION

For the above reasons, the Court should simply hold this case pending resolution of *Cutter*. The Court should deny Petitioner's unsupported request for a stay.

Respectfully submitted,

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